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No. 505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROBERT WOLCOFF, SANFORD BURTON WOLCOFF, PAT MANNO, and LARRY FREEDMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioners, Robert Wolcoff, Sanford Burton Wolcoff, Pat Manno, and Larry Freedman, respectfully pray a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in the case of *United States of America*, Plaintiff-Appellee, vs. *Robert Wolcoff, Sanford Burton Wolcoff, Pat Manno, and Larry Freedman*, Defendants-Appellants, Numbers 15742-5.

OPINIONS AND ORDERS OF THE COURTS BELOW

The judgment of conviction, and sentence of the United States District Court for the Northern District of Illinois, Eastern Division, was entered and imposed on March 25, 1966. They are not reported but appear in the printed appendix filed, and certified by the Clerk of the United States Court of Appeals for for Seventh Circuit as a part of the record and transmitted herewith.

No opinion was rendered by the District Court. The opinion of the United States Court of Appeals for the Seventh Circuit, affirming such judgment, was filed on June 2, 1967, and is not yet reported, but is set forth in petitioner's appendix hereto (*infra*, pages App. 1-7*), and in the certified copy of the record.

Petition for Rehearing was denied on July 19, 1967. No opinion was rendered on the Petition for Rehearing, and the Order denying such Petition is not reported, but is set forth in the appendix hereto (*infra*, page App. 9) and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on June 2, 1967. On July 19, 1967, it was ordered that the Petition for Rehearing be denied (these orders appear in Petitioners' Appendix hereto) (*Infra*, pages App. 8-9). This petition is filed within thirty days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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* "App. ....." refers to Supplemental Appendix, infra. "A. ....." refers to Appendix filed in Court of Appeals.

QUESTIONS PRESENTED

1. Did not the government intrude on petitioners' right to counsel by placing an informer, disguised as a co-defendant, in their midst?

2. When trial counsel's judgment not to call a witness was influenced by statements made by the prosecutor during the trial (but not recorded), that the witness had been threatened, did not wish to speak with defense counsel outside the presence of the prosecutor and was hostile—all of which was after trial,—denied by the witness by affidavit (in fact he maintains he had been coerced by the prosecutor into coming to Chicago from California, was met at the airport by agents of the government, held a virtual prisoner of the government for five days, and would gladly have testified for the defense had he been contacted)—can conviction under such circumstances stand?

3. When the defense maintains it was intimidated by remarks of the prosecutor made during the trial but not recorded, does failure to comply with the mandatory provisions of the Court Reporter's Act, thus preventing effective appellate review, require a new trial?

4. When a defendant is prohibited from presenting a defense to the jury because of the objection of a co-defendant that the other's defense would be prejudicial to him and where the defendant offering the evidence had moved for severance, has he not been deprived of a fundamentally fair trial in violation of the Sixth Amendment?

5. When the government's principal witness and charged co-defendant testified that he has been made no promises nor does he have expectations of leniency or consideration from the government, and yet seventeen months have passed and he has not been called for trial, nor has he

changed his plea of not guilty, are not the necessary implications that he gave false evidence on trial, known to the prosecutor, and allowed by the prosecutor to go uncorrected, so that the jury would not know the extent of his interest, such as to require a new trial?

STATUTE INVOLVED

> "(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; . . ." Title 28, Chapter 49, Section 753(b)

STATEMENT OF THE CASE

In an eleven count indictment, all defendants were charged in Count One, with conspiracy to defeat the bankruptcy laws and the mail fraud statutes in violation of 18 U.S.C. Section 371; in Count Two, with the transfer and concealment of bankruptcy property in violation of 18 U.S.C. Section 152, and in Counts Three through Eleven, with the use of the mails in furtherance of a scheme to defraud in violation of 18 U.S.C., Section 1341.

The cause went to trial before a jury, and verdicts of guilty as charged were returned as to all defendants except defendant Hartman, who, on Motion of the Government, was severed on the first day of the trial. The Defendant Hartman was the principal Government witness on the trial. No issue was made of the sufficiency of evidence on the appeal to the Seventh Circuit, and that court has clearly and concisely set forth the necessary facts for an understanding of the evidence. (App. 2-4)

Briefly the facts are as follows. In October, 1962, Petitioners Manno and Burton Wolcoff decided to go into the business of selling premiums. (Merchandise used by the businesses as gifts to employees for making sales and as inducements to prospective customers). The business was called Catalogue Premium Specialties.

In late October of that year, Freedman and Burton Wolcoff offered a job to Morton Hartman (the defendant severed on the first day of trial and the principal government witness). Wolcoff told Hartman that Freedman and he had a business called Catalog in Chicago. Two weeks later Hartman went to Catalog where Manno was introduced by Burton Wolcoff as his partner in Catalog.

Hartman agreed to work as a buyer and salesman. Wolcoff told him his duties were to telephone manufacturers, wholesalers, and factory representatives listed in the yellow pages of the telephone book, and to place orders for merchandise. Hartman was told to keep his orders down to about twenty-five or fifty dollars because "well, if we have to scam, we have got to have small bills because the creditors won't be after us on a scam for small bills, but they would for big ones."

In early November, 1962, Robert Wolcoff and John Lorusso (a convicted co-defendant, who abandoned his appeal) came to Catalog where Lorusso was introduced to Hartman as Robert Wolcoff's partner in a company they were starting in Berwyn, Illinois, called Fiesta Warehouse Center. Robert Wolcoff asked for a list of suppliers who had supplied merchandise on credit to Catalog and to a business called "House of Carpets".

Shortly after a move to Fiesta from Catalog, a meeting of all of the defendants was called. Each was assigned certain duties. Burton and Robert Wolcoff were to oversee all orders but would remain in the background. Burton explained that he and his brother Robert had just scammed a company called "House of Carpets", and because many salesmen would know them, they could not show themselves at Fiesta. It was intended that they would operate Fiesta as "House of Carpets" had been operated, that is, scam. It was explained by testimony that "scam" was the ordering of merchandise on credit and not paying for it, and thereafter going into phony bankruptcy to beat the creditors out of the purchase price of the goods ordered.

As credit manager, Burton Wolcoff used the name of Burton Reynolds. At the first meeting at Fiesta, Burton explained to the others that they had to pay off certain creditors such as General Electric and other major appliance people, so that they could use them for credit references. However, he explained that with smaller companies the procedure would be to buy small quantities of merchandise, pay for them, then immediately re-order twice the amount previously purchased, and also to endeavor to get a third order before the end of the month billing became due. Burton told them that the cash received would be syphoned out of the bank account on checks made to fictitious names, supposedly for labor and other expenses. The proceeds of the checks went to Burton.

Eventually, in late February or early March of 1963 a lawyer for one of the creditors attempted to collect $3000 owed it by Fiesta. Hartman succeeded in stalling until March 25th, when the lawyer went to Fiesta with the Sheriff and a Writ of Attachment. Again Hartman was successful

in averting the attachment. At that time a goodly amount of goods was in the store. However, on a subsequent visit to the store, it was stripped to the bare walls. (App. 2-4, *infra*).

The lawyer looked for Hartman but couldn't find him, so an involuntary petition in bankruptcy was filed, and a receiver appointed. (Tr. 578-579, 1510-1522) After the involuntary petition in bankruptcy was filed, and the receiver appointed, no monies or merchandise were ever made available to the bankruptcy court. (Tr. 1127-1128)

PROCEEDINGS AFFECTING THE TRIAL

On the first day of trial, immediately after the case was called to proceed, the government moved to sever the case as to the defendant Hartman on the ground that Hartman would be a government witness. A motion for mistrial and postponement was made on the ground that the attorney for Hartman had just participated in a conversation among all the defense counsel, in which strategy was discussed. Later a renewed motion was made for continuance "based on the fact that the attorneys for Hartman were in conference with us prior to the time that we walked into this courtroom, and on the further ground that the defendants, Freedman and Burton Wolcoff had discussed the matters about to be tried in the immediate past"; that "one defendant was discussing the matters involved in the indictment and now announces that he is going to be a witness against the other defendants." One of the attorneys further supported his motion on the basis of a then present knowledge that at a time that the petitioners, with their counsel, were discussing trial strategy, the defendant Hartman and his lawyer knew that an application would be made to sever him so that he could be a

government witness. One of the lawyers for these petitioners stated their position thus:

> "If I may just state briefly our position in this matter, Your Honor, I think that what counsel are fearful of here as to what has taken place and what has not taken place, and so forth, I don't know about that, first of all but I think that we are fearful of the fact that we have had someone in our midst who has sort of been acting as a double agent. We don't know if this is true or not. The point is—". (A. 64)

The immediate ruling of the court in this regard is pertinent to the questions presented on this petition:

> "The Court: You are assuming that you have a Hoffa case that has not been decided yet coming up here.
>
> "Gentlemen, let me say this, that it appears, during the trial of this case, that you have, in fact, been seriously prejudiced by what took place here this morning in connection with this, I will let you, of course, at that time, present any matters to me. But unless some showing is made that you have been prejudiced, apart from the fact that co-defendant, whom you expected to have sitting at the counsel table with you, is going to, in effect, testify for the Government, and that happens a great many times during trials of cases and there is nothing unusual about it, but if it does appear that something happened, that something occurred out there and it is revealed that, because of what occurred out there, something should happen here from the witness chair that would not have happened otherwise, why, I will take up your motion at the appropriate time; but, not at this moment." (A. 64)

It was also represented by one of the counsel for the defense that the petitioner Freedman was induced to discuss the case with one of the attorneys for the government witness Hartman, without that attorney divulging his position, or that he was in fact an attorney for the principal government witness. (A. 58-65)

When the witness Hartman was called on to testify in favor of the government, the motions were renewed and denied. (A. 66) It developed in the course of cross-examination of Hartman that he had decided that he would testify in favor of the government some five months before the case came to trial, and that he was preparing for his testimony in cooperation with the government during that period. He admitted to conversations with at least one of the defendants, and he further admitted he informed one or more of the agents of the government that such conversation had been held and what it related to. (A. 84-88)

In affirming the conviction and ruling on this point, the Court of Appeals for the Seventh Circuit determined that no hearing was requested; that Hartman's counsel stated to the court that in his conference with the co-defendant's counsel neither trial strategy nor trial tactics were discussed; that it further appeared that the only post-indictment conversation between Hartman and the other defendants or their attorneys was a telephone call between Hartman and Burton Wolcoff which did not concern the instant case, and while the Court of Appeals recognized that the arguments of these petitioners was that prejudice could not be shown without the holding of a hearing, they were not denied the effective assistance of counsel by failure to hold a formal hearing. (App. 4-6).

During the course of the trial the record reflects that on five occasions there was a failure to record proceedings at side-bar in accordance with the mandate of the Court Reporter's act (Tr. 570; 360-361; 1200; 1276; 1275). At the time of filing the Brief-in-Chief, no demonstration of prejudice could be made. Subsequently one of trial counsel took a statement on oath before a Notary Public of one Hy Handwerker. It appears from his statement (attached hereto as Exhibit 1 to a Motion made in the United States Court of Appeals for the Seventh Circuit to issue an order authorizing the court to take evidence (App. 10-26)) that in the course of the trial herein, Burton Wolcoff contacted Mr. Handwerker telling him he wanted him to come in to testify in his behalf. Handwerker, according to his sworn statement, consented to do so, and Burton Wolcoff said he would wire by Western Union money for him for his transportation. He revealed this request to government witness Hartman's wife, and told her he was going. Sometime later that same evening he received a telephone call from the witness Hartman and after a few introductory words, a person was put on the phone who introduced himself as Mr. Mollenoff, the Government prosecutor. Mollenoff, again according to Handwerker's sworn statement, indicated he was aware that Handwerker received a call from Chicago and that he was coming to Chicago. The prosecutor first asked and then insisted that Handwerker had been threatened, which Handwerker denied in either context. After further conversation, the person who identified himself as a prosecutor told Handwerker that he was tired of pampering him, and asking him to come to Chicago as a government witness and that if he didn't come as of his own free will he would have him brought to Chicago under process. Arrangements were then made for Handwerker to come to Chicago—which he

did—and was met at the plane in Chicago by two persons who identified themselves as prosecutors and one Federal Bureau of Investigation Agent. They proceeded directly to the federal building, where the witness Donald Hartman was, and there the prosecutor proceeded to ask questions relative to his acquaintance with the Wolcoffs and Fiesta. He was again asked if he had been threatened into agreeing to come to Chicago and he answered no. The questioning went on for about one-half an hour and then the two prosecutors, the F.B.I. agent and Hartman walked him over to the Palmer House and took him to his room. He was instructed by the Agent and the two prosecutors not to leave the room under any condition outside the presence of one of them, and was told that any calls he might make would be monitored and recorded. He stated that he remained in that room for five days and five nights except when he was taken to the federal building by the F.B.I. agent on the premise that he might be called by the defense. The F.B.I. agent, according to the statement, stayed in the room next to him, periodically looking in on him. All of his meals were delivered by room service. After the five days he was released and sent back to California with the government paying all of his expenses. (App. 14-22)

Later he was told by one of the defense trial counsel that the purpose the defense had in considering calling him as a witness was that he might testify to the bad character of the witness Hartman, with whom he had been in business.

Appellate counsel was informed by trial counsel that the reason they had not called Hy Handwerker as a witness was that in an off-the-record conference the prosecutor advised the court that Hy Handwerker had been threatened; that the witness did not wish to speak to de-

fense counsel outside the presence of a representative of the government, and that generally the witness was hostile. (App. 10-13)

Reference to the transcript of the trial revealed that this colloquy had not been transcribed. Appeals counsel then contacted the official court reporter and requested a write-up of the discussion and was advised that no stenographic, stenotype, nor any type of recordation was made of the discussion or colloquy adverted to. With this information at hand, a motion was made in the Court of Appeals for the Seventh Circuit to issue an order authorizing the trial court to take evidence for the purpose of determining whether the statements made were in accordance with the memories of the several trial attorneys. The Motion indicated that questioning of the trial attorneys resulted in a determination that they would not call Handwerker because of his attitude as reflected by the remarks of the prosecutor in the off-the-record colloquy. (App. 10-13)

In the answer to the motion, portions of the record that were transcribed, pointed out the prosecutor said that Handwerker indicated, with reluctance, that he would speak to the defense in the United States Attorney's office, and that they could see him. The defense elected not to, since accepting the statement of the prosecutor in the off-the-record conference, they wanted nothing of the hostile witness, who said he had been threatened.

Upon the motions and the answer made thereto the Honorable Thomas E. Fairchild, Circuit Judge for the Seventh Circuit denied the motion to remand on consideration of the said papers in that "the transcript shows affirmatively that the government counsel made the prospective witness available for interview for defendants' trial counsel." The order also provided that it was entered without prejudice to renewal thereof by defendants at the time of the argument on the merits of the appeal. (App. 36)

Thereafter the government filed its answer brief, and in a reply brief the matter was again raised, setting out the Court Reporter's act had been violated and that it now (and not at the time of the filing of the brief-in-chief) appeared that prejudice did ensue by violation of the statute, since the actual proceedings were unavailable to the defense in connection with their motion. On argument before the court, the matter was again raised. No reference was made to this point of complaint of error in the decision of the Court of Appeals in this cause. (App. 1-7)

On April 20, 1965, this indictment was returned. Within a month, the Petitioner Freedman filed a Motion for a separate trial (A. 2, 4). It was denied.

On the trial the defendant Freedman took the stand in his own defense. He testified that on the 18th or 19th of December, he had a conversation with Petitioners Wolcoff at which the government witness Hartman was present. He was about to relate on the stand the substance of the conversation he had with Wolcoff relative to a personal checking account. Objection by the government to the conversation was overruled. However, at a request by government counsel that Freedman be required to tell how it would be tied up to the issues of the lawsuit, the court directed an offer of proof outside the presence of the jury. The offer of proof was that petitioner Freedman would testify that in the conversation he was asked to draw two checks by one or other of the Wolcoffs or Hartman to an individual named Leonard Wineburg, which Freedman declined to do, saying that he didn't have that kind of money. Burton prevailed upon him to draw them, as, according to Burton, they were needed in connection with the acquisition of other businesses, and that Burton Wolcoff should make them good. Thus the offer continued,

Freedman did then draw the checks on his personal account and the checks were submitted to the bank for certification, where, of course, they bounced. The offer continued that Freedman came back and told his co-defendants to take his name off the Fiesta account, he didn't want anything more to do with it, and that he hadn't been told the truth.

Counsel for Freedman explained that the purpose of this evidence was to show motivation in having his name taken off the account, and that it was not taken off the account for the reasons testified to by Hartman. However, one of the attorneys for the defendants Wolcoff stated to the court that if this evidence went in before the jury it was his intention to move for a mistrial and severance because of the prejudicial nature as it affected his client. Thereupon the government counsel withdrew his objection, but Wolcoffs' counsel refused to do so, and again indicated his intention to ask for severance and mistrial. (A. 135-138)

The ruling of the court is as follows:

> "The Court: My ruling will be that the evidence is not admissible because it may be prejudicial to the defendant Wolcoff. It relates to, in effect, another separate offense that I don't think is directly connected with this matter. You can ask the witness whether he had some disagreement about what happened in connection with the operation of this account, but without going into detail." (A. 139-140)

The Petitioner Hartman claimed error in that he was restricted in the presentation of his defense. No separate ruling was made on this claim of error by the United States Court of Appeals for the Seventh Circuit, in that, in that court's opinion, they did not merit "individual discussion." (App. 7)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

This court's power of supervision is required when the prosecutor, knowing for at least five months that a charged co-conspirator is to be the government's principal witness, secretes that information from the petitioners, actually holds the informant out as a co-defendant until the day of trial to secure advantages over the defense. It is required when a trial court refuses a hearing in the circumstances unless the defense makes an affirmative showing of prejudice to the end that the advantages and information the government secured during this period were shrouded, and the prejudice is concealed. A hearing to develop the motive of the government and to define the advantages it gained was a "proper, even a required proceeding in the circumstances." The summary procedure here conflicts with the spirit of this court's ruling in *Campbell* v. *United States*, 365 U.S. 85, 92.

The action of the government herein surpasses any mere ethical problem, it actually deprives defense counsel of opportunity of proper preparation for trial. Had Hartman's role in this cause been disclosed five months prior to this trial, instead of having him remain with the defense, with the defense necessarily preparing their strategy from that viewpoint, had they been informed that a co-defendant would be a witness against them, and opportunity be had for preparation of their defense under those changed circumstances and also an investigation going to credibility, an entirely different approach would undoubtedly have

been made. Had Hartman pleaded guilty, as he confessed guilt on the trial, had he been sentenced and his sentence or probationary period as lenient as the circumstances imply he expected, these matters would all have been of great defense importance. Had he pleaded guilty, and his sentence postponed over the five month period it would have been indicative to the jury that he was expecting *quid pro quo* for his cooperation with the government, and that his enthusiasm was measured by the relief he expected. But all of these things were concealed from the defense by the prosecutor's action herein.

We therefore submit that the circumstances in this case go far beyond the role of Partin in *Hoffa* v. *United States*, 87 S.Ct. 408, and is in direct conflict with the theories expressed therein. At least Hoffa invited Partin into his camp; here Hartman was thrust upon the defendants by the government as a charged common co-conspirator. The only recourse of petitioners lay in cooperation with the secret government informer and the situation was of the government's making.

We do not know but that the government *ab initio* indicted their informer for the sole purpose of thrusting upon the defense their "informer". Knowing he was cooperating, the indictment of Hartman placed him securely within the defense camp.

Further, this court's power of supervision is required when the Court of Appeals sanctions the actions of the trial court—*without sworn testimony*—in the face of conflicting representations and contrary to representations made.

This court will note that the following statement was made, upon being advised that Hartman was severed out and was to be the principal government witness:

"If I may just state briefly our position in this matter, Your Honor, I think that what counsel are fearful of here as to what has taken place and what has not taken place, and so forth, I don't know about that, first of all, but I think that we are fearful of the fact that we have had someone in our midst who has sort of been acting as a double agent. We don't know if this is true or not. The point is—" (A. 64)

That the trial court interpreted this as the request for a hearing is undeniable.

"The Court: You are assuming that you have a Hoffa case that has not been decided yet coming up here.

"Gentlemen, let me say this, that if it appears, during the trial of this case, that you have, in fact, been seriously prejudiced by what took place here this morning in connection with this, I will let you, of course, at that time, present any matters to me. But unless some showing is made that you have been prejudiced, apart from the fact that a co-defendant, whom you expected to have sitting at the counsel table with you, is going to, in effect, testify for the Government, and that happens a great many times during trials of cases and there is nothing unusual about it; but if it does appear that something happened, that something occurred out there and it is revealed that, because of what occurred out there, something should happen here from the witness chair that would not have happened otherwise, why, I will take up your motion at the appropriate time; but, not at this moment." (A. 64)

Yet the Court of Appeals for the Seventh Circuit in its opinion based it upon, in part, that "no hearing was requested; . . ." (App. 4). We submit that it is clear that

a hearing was in fact requested, that the trial judge recognized that a hearing was requested, and denied it.

But, further, the decision of the Court of Appeals makes a point of ignoring the true facts to the end that appellate review has actually been foreclosed.

That court determined that "Hartman's counsel stated to the court that neither trial strategy nor trial tactics had been discussed". (App. 5)

The pertinent portions of the record relating to the representations of defense counsel pertinent thereto are:

> "the attorney for the defendant Hartman has just participated in a conversation among all defense counsel, in which a strategy was discussed, without the slightest reflection upon his integrity or anything like that. It puts him in a terribly ambivalent position. This was not more than three minutes ago." [A. 58-59]
>
> "He participated in trial strategy, Your Honor. That was in the pretrial conferenee, the pretrial conference we just had." [A. 59]
>
> • • •
>
> "And then, two minutes before you start picking a jury, one of the defendants is represented to be going to testify, why, then I assume—I assume that he can only testify against the other defendants. It puts you in a position where your preparation for trial has been entirely for naught." [A. 59]
>
> • • •
>
> "Secondly, the defendant Freedman tells me that he discussed this matter with Mr. Sachs, Mr. Jerome

Sachs, one of the attorneys for Mr. Hartman, prior to today;" [A. 61]

* * *

"Mr. Nasser: The other thing is that they have been deprived of the effective assistance of counsel when their counsel was sitting in with us and we are discussing our case, and they come out of the courtroom five or ten minutes later and say 'We want to plead our man guilty and have him testify on behalf of the Government.'" [A.62]

* * *

"The Court: You say 'trial strategy'. Weren't you out in the conference room to determine what you were going to do with reference to the exercise of challenges, and also with reference to the asking of certain questions to the jury on voir dire, isn't that—and one stipulation that you all entered into?'

Mr. Lewis: We went a great deal further than that, Your Honor.

Mr. Nasser: We discussed several other things in that conference.

Mr. Lewis: Matters of considerable sensitivity; I might say, almost ultimate sensitivity." [A. 63]

* * *

"It appears that he [one of Hartman's attorneys] has an office either next door or quite close to where Mr. Freedman is employed in a clothing store, and he came in and introduced himself to Mr. Freedman and to the owner of the store, and started telling him about the nature of his practice; and the owner of the store said, 'Oh, you ought to hear about Mr. Freedman's case.' And then, 'Oh, really, what is that all about?'

> Mr. Freedman was thereby induced to discuss the case with the attorney, one of the two attorneys for Mr. Hartman, under conditions that I deem to be quite inappropriate." [A. 65]

* * *

Against these representations were those of Hartman's attorney:

> "We did not discuss court strategy. We did not discuss trial tactics. We discussed additional voir dire. We didn't discuss trial tactics in the sense that has been mentioned." [A. 60]

And those of government counsel:

> "Mr. Molenof: The Government is not in possession of any information concerning what transpired anywhere at anytime concerning these gentlemen, nor will the Government ever come into possession of anything that may be taken advantage of; and I seriously doubt that anything that they suggested occurred in that manner." [A. 65]

We submit that on the basis of such conflict alone a hearing should have been ordered.

The Court of Appeals for the Seventh Circuit further found:

> "It further appeared that the only post-indictment conversation between Hartman and the other defendants or their attorneys was a telephone call between Hartman and Burton Wolcoff which did not concern the instant case." (App. 5)

We submit that could not be accepted as the fact without inquiry under oath, especially in the light of the representation made relative thereto.

"Mr. Burton Wolcoff has discussed this matter with Mr. Hartman by telephone as of last Thursday." [A. 61]

"Mr. Nasser: Well, Your Honor, here we have a situation where one defendant is discussing the matters involved in the indictment, and now he goes and tells the Government that he wants to be a witness against us.

Now these people have effectively been deprived of a fair trial." [A. 61]

The only representation that appears of record from the Government (none by Hartman's attorneys) at the trial level is as follows:

"Mr. Molenof: He has had no contact whatsoever with any of the defendants, except that he received a telephone call last week from the defendant Burton Wolcoff, as Mr. Nasser suggested." [A. 65-66]

It is clear that there was no representation made, even by Government counsel, that that conversation did not concern the instant case.

It is submitted to this court that it should issue its Writ of Certiorari to the end that defendants in criminal cases have their causes reviewed on the record made—as opposed to facts assumed.

II.

Since hearing was denied to determine whether the off-the-record representations of the government concerning Hy Handwerker had any basis in fact, and if the alleged reluctance and hostility of the witness Handwerker were, in fact, what defense trial counsel remembered, it is submitted to this court the allegations on the motion which had as its purpose the reconstruction

of the record (which allegations were never denied) must be accepted here, or the cause remanded for the hearing as asked in the first instance.

Under the circumstances it must be accepted that defense counsel, accepting the representation that the witness had been threatened, that the witness refused to see defense counsel except in the presence of a government representative, that the witness was hostile, and that the witness would be uncooperative (all sworn to be false by the witness later) elected not to investigate the value of Mr. Handwerker as a defense witness. It must be accepted that the defense was therefore deprived of his value. We submit that the procedure followed in this case by the Court of Appeals for the Seventh Circuit is in conflict with the decision of the Court of Appeals for the District of Columbia in *Gregory* v. *United States,* 369 F. 2d 185, which holds in effect that access to possible witnesses may not be interfered with.

III.

Though no decision was rendered in the opinion in this cause relative to the point that the mandatory provisions of the Court Reporter's Act had been violated, nonetheless the endorsement by the Court of Appeals for the Seventh Circuit of a failure to comply with that act is in conflict with the decisions of the Tenth Circuit in *Edwards* v. *United States,* 374 F. 2d 24 and of the Fifth Circuit in *Fowler* v. *United States,* 310 F.2d 66.

In *Edwards* (*supra*) the court found it constitutes error to fail to report any portion of a proceeding in a criminal case. In that case the Tenth Circuit found the omission not to be prejudicial error since the uncontested statements of the lawyer was that the conference concerned the fact

that witnesses would testify that the reputation of the defendant was good, and, in fact, thereafter seven witnesses did so testify without contradiction. Here, however, as a result of the side-bar conference, it was alleged that a bad character witness relating to Hartman was not called on by the defense because of the representations made by the prosecution in the off-the-record conference that the witness was unwilling, hostile, and would not speak to the defense outside the presence of the government. In such a case in *Fowler* v. *United States,* 5 Cir., 310 F.2d 56, that court found that the requirement of Section 753(b) was mandatory and that, without a transcript, the reviewing court was unable to determine whether the action of the United States Attorney constituted such prejudice as to require a reversal. We submit, that both of these decisions are in conflict with the processes approved *sub silentio* by the Seventh Circuit in this case, and, that further, by ignoring the point raised, these defendants have been deprived of the statutory right to effective review on appeal, and that in the circumstances this court should exercise its supervisory power against departures from statutory mandate in judicial proceedings by a trial court and sanctioned by a court of review.

IV.

We respectfully submit that this court should issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit when, as here, the petitioner Freedman was precluded from making his individual defense because co-defendants claim they would be prejudiced by that defense before a jury. We submit that the proper procedure would have been the severance of either Freedman or the co-defendants and the failure to do so is contrary to this court's

opinion in *Schaffer* v. *United States*, 352 U.S. 511, 516, and to the decision of the Seventh Circuit itself in *United States* v. *Reed*, 376 F.2d 226, 229.

Most notably it is a violation of the Sixth Amendment to the Constitution of the United States guaranteeing to the petitioner Freedman his right to the attendance of witnesses, even himself, when it is believed by the petitioner that the proof will tend to negate the government's evidence or support his individual defense. The mandate of the Sixth Amendment in this regard has been universally recognized, and, while the Court of Appeals for the Seventh Circuit has issued no decision on this claim of error, the import of the sanction of the lower court's action in this regard, is contrary to the Fifth Circuit ruling in *Everett* v. *United States*, 281 F.2d 429, 438; the Eighth Circuit ruling in *Gajewski* v. *United States*, 321 F.2d 261, 268-9; and the Third Circuit ruling in *United States* v. *Myers*, 327 F.2d 174, 182.

V.

When, on the first day of trial the government moved to sever its witness and then named co-defendant, as has been set forth hereinbefore, the court below made an observation that was a natural inference from the circumstances:

> "The Court: Let me say this: This defendant can plead guilty right now, if he desires to plead guilty, and the Government would have the right to proceed against the rest of you. I don't know what difference it makes, the fact that he, instead of pleading guilty, the Government is asking leave to sever the trial as to him, on the basis that, I assume, he is going to enter a plea of guilty." (A. 59)

We submit that the natural assumption was, as the trial court made the natural assumption, that the witness co-defendant-co-conspirator Hartman would plead guilty.

However, on the trial, on cross-examination, Hartman rejected any implication that he had been promised anything, and this was recognized by the United States Court of Appeals for the Seventh Circuit:

> "On cross examination, Hartman testified that he had not been promised anything to testify in this case; that no promises of any kind had been made to him, . . ." (App. 6)

The attention of the Court of Appeals was brought to the fact that a year and a quarter had passed since the trial of these petitioners, and Hartman has never been brought on to change his plea to guilty or to stand trial, and that the records do not reflect any effort to have him do so. (App. 37 *et seq.*, Docket Entries)

We submit the necessary implication is that when he said he had been made no promises nor does he have expectation of leniency or consideration from the government, his testimony was false, known by the prosecutor to be false, and allowed by the prosecutor to go uncorrected. We submit this is contrary to this court's ruling in *Giles* v. *State of Maryland*, 87 S. Ct. 793:

> "Thus the case presents the broad questions whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial. We find, however, that it is unnecessary, and therefore inappropriate, to examine those questions. In *Napue* v. *People of the State of Illinois, supra,* 360 U.S. at 269, 79 S.Ct. at

> 1177, we held that a conviction must fall under the Fourteenth Amendment when the prosecution 'although not soliciting false evidence, allows it to go uncorrected when it appears,' *even though the testimony may be relevant only to the credibility of a witness.*" *Giles* v. *State of Maryland*, 87 S. Ct. 793, 797. (emphasis supplied)

We submit that the relief granted there should be given here.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, in this case.

Respectfully submitted,

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